83-987

SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Respondent,
v.
GARY S. BALL,
Petitioner.
UNITED STATES OF AMERICA,
Respondent,
v.
JOHN HANNA BROWNFIELD,
Petitioner.

PETITION FOR WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The following questions are presented for determination by the Court:

1. Whether the use as evidence against Petitioner Ball of out-of-court statements made by co-Petitioner and co-Defendant denied him of his right to confront and cross-examine witnesses and violated the hearsay rule; that evidence being admitted on a showing of slight evidence of Petitioner's involvement in a conspiracy with the declarant.

2. Whether, based upon the mere assertion by the government that tape-recorded statements by petitioner to federal agents contained neither relevant nor exculpatory evidence, the Court's summary denial, without hearing or inspection, of petitioner's motion to inspect and copy those tape-recordings violated petitioner's Fifth Amendment due process rights to a fair trial.

3. Whether a finding by the Court of Appeals that there was ample evidence that petitioners conspired to "purchase" cocaine offered for sale by federal agents supports an affirmation of a conviction of conspiracy to possess cocaine with intent to sell or distribute.

4. Whether evidence that Petitioners agreed to inspect a quantity of cocaine offered for sale by federal agents and depending on whether the cocaine met acceptable requisites of purity and, cosmetic appearance, then decide how

much, if any, to purchase from the undercover agents is sufficient to sustain a conviction for conspiracy to possess cocaine with intent to sell or distribute.

5. Whether actions of federal agents posing as members of a drug smuggling ring in first contacting petitioner in laundering "drug" money, then offering to sell petition cocain on a continuing basis, enlisting him to set up a cocaine distribution network in exchange for funding a proposed bank, constituted outrageous government conduct violating the Fifth Amendment due process rights of petitioners.

PARTIES TO THE PROCEEDINGS

The parties to this petition for certiorari are the UNITED STATES OF AMERICA and the named defendant-petitioners, BALL AND BROWNFIELD.

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Respondent,

PETITION FOR WRIT OF CERTIORARI

Petitioners hereby pray for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit as to Petitioners, entered on July 18, 1983, and the Court's denial of reconsideration entered on October 18, 1983.

The judgment affirmed the judgment of the United States District Court for the Central District of California as to Petitioners entered October 25, 1982.

OPINIONS BELOW

There were no opinions issued by either the court of appeals or the District Court, but both issued Memorandum Orders which are affixed hereto at the Appendix.

JURISDICTION

On July 18, 1983, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the United States District Court for the Central District of California as to Petitioners. On October 18, 1983, the Court denied the petition for reconsideration. This Court has jurisdiction to review this case under 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No Person shall . . . be deprived of life, liberty, or property without due process of law;"

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions the accused shall enjoy the right to . . . be confronted with the witnesses against him;"

Title 21, Section 846, United States Code provides in pertinent part:

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine. . ."

Title 21, Section 841 provides in pertinent part:

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . ."

United States Code, Federal Rules of Evidence provide in pertinent parts:

"Rule 104(a): Preliminary questions concerning. . .the admissibility of evidence shall be determined by the Court, subject to the provisions of subdivision (b). . .

(b): When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon . . .the introduction of evidence sufficient to support a finding of the condition.

Rule 801(d): A statement is not hearsay if--

(2) The statement is offered against a party and is. . .(E) a statement by a co-conspirator of a

party during the course of and in furtherance of the conspiracy."

United States Code, Federal Rules of Criminal Procedure provide in pertinent part:

"Rule 16(a)(1)(A): Upon request of a defendant the government shall permit the defendant to inspect and copy. . .any relevant. . .recorded statements made by the defendant. . ."

STATEMENT OF THE CASE

The trial in this matter was based upon a stipulation which included eight exhibits. The defense reserved all legal objections to the evidence and the right to examine or cross-examine the witnesses whose testimony was presented by stipulation. Petitioners were tried together.

Petitioners BALL and BROWNFIELD were both charged and convicted in Count I of the Indictment of conspiring to possess cocaine for sale and/or distribution.

BROWNFIELD was charged and convicted in Count II of distribution of the one-half (1/2) gram of cocaine.

BALL was charged and acquitted in Count III of possession of cocaine for sale.

BALL was sentenced to six (6) years in custody. BROWNFIELD was sentenced to six (6) years in custody on each count, to run concurrently, and fined twenty-five thousand dollars, ($25,000.00) on each count, consecutively.

A timely Notice of Appeal was filed, and on July 18, 1983 the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court. A timely petition for rehearing was filed and on October 18, 1983, the Court denied the petition.

On September 16, 1981, Internal Revenue Service (IRS) Agent DWYER contacted Petitioner, JOHN BROWNFIELD, told him that he was a financial consultant who handled large sums of money and that he had a business proposition for the appellant. The two arranged to meet, and did, on September 19, 1981, at Los Angeles International Airport (LAX). DWYER explained that he had clients who needed assistance in handling large sums of cash, and were in the import business. He invited BROWNFIELD to Seattle.

On September 22, 1981, BROWNFIELD arrived in Seattle, went directly to a yacht and was met by IRS undercover Agent DARRELL WHITEHEAD. WHITEHEAD was introduced as DWYER's partner in the financial arrangement. WHITEHEAD and DWYER represented that the yacht they were on belonged to a "client" of theirs, and stated that the yacht was only as good as the amount it could haul. The clear inference the agents meant to convey, and did, was that they were dealing in illegal products.

dealing in illegal products.

DWYER spoke with BROWNFIELD on the phone September 16, September 22, and September 29, 1981, met with him at LAX on October 2, 1981, and spoke with him again on the phone on November 5, 1981. **All of these conversations were tape-recorded but were not made available to the petitioners.**

On December 2, 1981, DWYER contacted BROWNFIELD in Los Angeles and arranged a meeting (the tape of this call was withheld) for that evening. On the evening of December 2, 1981, BROWNFIELD met DWYER at the bar of the Century Plaza Hotel in Los Angeles. DWYER and BROWNFIELD first began discussing a way to set up a bank in or start to handle DWYER's alleged cash problem. Appellant stated that he had somebody research the problem and the cash could be taken care of in a legal manner. The conversation then turned to a problem the appellant was having due to a lack of "product". DWYER stated that WHITEHEAD had just returned from five weeks in South America. DWYER asked if appellant was proposing a joint venture, to which appellant replied that something could be worked out. DWYER asked "what are we talking about, grass or coke?" Appellant replied, "Weed." DWYER understood "weed" to mean marijuana.

At this time, WHITEHEAD and IRS undercover agent RICHARD AARONSON entered the bar and sat with DWYER and the appellant. AARONSON was intro-

duced by DWYER as "one of the people who works for us in Los Angeles." After some conversation, BROWNFIELD explained to WHITEHEAD that "his people were short of product." There was some discussion about a "joint venture," but WHITEHEAD did not commit himself. The subject of cocaine was never discussed at this meeting. However, it was WHITEHEAD's contention that appellant wanted to deal in cocaine, even though WHITEHEAD was aware that appellant told DWYER he was interested in marijuana. WHITEHEAD based this belief on a "gut feeling." The Agents attempted to tape this conversation but the recording device malfunctioned according to the government.

On December 16, 1981, BROWNFIELD went to WHITEHEAD's hotel room in Los Angeles for a pre-arranged meeting. The two were set to go meet others for lunch. The entire meeting was tape-recorded. Before leaving for the restaurant, BROWNFIELD and WHITEHEAD first began talking about the "deal" which was to be arranged. The following conversation took place:

WHITEHEAD (W): I've talked to him (DEA agent MORGAN, posing as the smuggler client) at length, but I don't know what **his approach is going to be to you.**

BROWNFIELD (B): Okay, but what I'm saying to you is ah -- there may come a time in point when -- **I don't know the volume your (sic) doing or what you're talking about.**

W: We're going to do . . .I'm assuming, I've never asked you. I'm assuming your (sic) doing coke.
(Emphasis supplied).

To which BROWNFIELD appeasingly replied, "Ya. Right." WHITEHEAD was the first person to suggest the commodity as cocaine. WHITEHEAD testified that he felt that BROWNFIELD was puffing when he mentioned 365 kilograms, and he also felt that there were inconsistencies in things that BROWNFIELD said.

WHITEHEAD went on to speak about the person who BROWNFIELD was to meet at the restaurant. WHITEHEAD explained that this person could "handle a lot of stuff." BROWNFIELD felt that the cocaine deal was a condition of the bank deal they had discussed earlier WHITEHEAD was unclear as to the positioning of the two deals. When talking of the man BROWNFIELD would meet, WHITEHEAD stated, "If he feels good with you, you won't have a problem."

WHITEHEAD complained that his client felt uncomfortable because he was selling, and that he vouched for BROWNFIELD. BROWNFIELD asked if WHITEHEAD would feel better if he sold some first. WHITEHEAD declined, but told BROWNFIELD to provide a small amount.

While en route to the restaurant, BROWNFIELD told WHITEHEAD that he had done some further research into WHITEHEAD's alleged cash problem. BROWNFIELD explained that by setting up a class "B" bank, the money could legally be taken care of

The two arrived at the Casa Escobar restaurant in Marina Del Rey and were met by AARONSON. BROWNFIELD was introduced to DEA undercover agent MORGAN. From the previous conversation between BROWNFIELD and WHITEHEAD, he knew MORGAN to be the person with whom he would be dealing. He first explained to the group the details of setting up a class "B" bank in order to handle their large amount of cash. He then went on to state that he was willing to set up any type of transaction so that the group would feel comfortable with him.

WHITEHEAD then turned the discussion to a cocaine deal that might be set up. Most of the discussion took place between BROWNFIELD and MORGAN. There was a great deal of haggling between the two regarding price, quantity, quality, and method of delivery and payment. It was agreed that 20 kilograms could be purchased for one million dollars. But the quality of the cocaine was to meet approval before the deal would be consummated. MORGAN stated that if he liked the quality, a deal would be struck. Otherwise, BROWNFIELD was free to "walk" and say "good-bye." MORGAN felt that if the quality was approved by BROWNFIELD, the two could come to a meeting of the minds. When BROWNFIELD was asked if he had to deal with other people to get approval, he stated, "I am my own people. . .I don't have to talk to anybody."

After more discussion, WHITEHEAD and BROWNFIELD left to go back to WHITEHEAD's hotel. BROWNFIELD mentioned that he thought DWYER was going to be at the lunch to discuss the bank deal. He was concerned because he wanted to make sure the bank deal was handled properly. He then stated that he was under the impression that the group was interested in dealing in marijuana or hashish.

WHITEHEAD was instructed by his superiors to "follow-up" on the possibility of BROWNFIELD providing a sample of cocaine. Thus, on December 21, 1981, when WHITEHEAD next spoke with him, WHITEHEAD told BROWNFIELD that he should provide MORGAN with a sample. WHITEHEAD said that it would make MORGAN happy, and MORGAN would then stop bothering WHITEHEAD. BROWNFIELD agreed.

WHITEHEAD and BROWNFIELD next spoke by phone on December 31, 1981. BROWNFIELD asked WHITEHEAD how the bank deal was coming along. WHITEHEAD replied that he had spoken to some people and that they were all receptive to the idea. WHITEHEAD did not foresee any problems in arranging the financing to start the bank. WHITEHEAD told him that his people would be willing to provide $5,000,000 to finance the bank.

On January 6, 1982, BROWNFIELD and MORGAN met at the Cannery Row Restaurant in Newport Beach, California. The meeting was tape-recorded. The two discussed plans for the cocaine deal. BROWNFIELD stated

that he would be alone. After much discussion, MORGAN proposed a plan that was agreeable to BROWNFIELD. For this plan to work, MORGAN told him that BROWNFIELD would need to bring a companion. MORGAN proposed that he, WHITEHEAD, and BROWNFIELD go to a place where the money was located. There, MORGAN would stay with BROWNFIELD's companion and count the money while WHITEHEAD and BROWNFIELD would go test cocaine. BROWNFIELD emphatically stated that if the cocaine was not up to high quality, there would be no deal. BROWNFIELD agreed to provide MORGAN with a sample of cocaine to make sure that MORGAN knew the quality of cocaine appellant expected.

BROWNFIELD also told MORGAN that he was "shocked" when he first learned that MORGAN wanted to deal in cocaine. He felt that DWYER only contacted him to set up the bank deal. He further stated that when he saw the yacht in Seattle, he thought WHITEHEAD's group might be dealing in marijuana.

On the next day, January 7, 1982, MORGAN and BROWNFIELD met at Charley Brown's restaurant in Rosemead, California. The meeting was tape-recorded. MORGAN told him that if, at the time of the deal, the cocaine appeared weak, the two could negotiate. BROWNFIELD went on to complain to MORGAN that WHITEHEAD was too intense and was pressuring to get the deal complete. BROWNFIELD said that he did not like the

way WHITEHEAD "pumped him up." MORGAN countered that he had been "pumped up" by BROWNFIELD. MORGAN explained that WHITEHEAD was working on a commission basis and that he was trying to "feel out" BROWNFIELD. BROWNFIELD admitted that he too was trying to "feel out" MORGAN. After the meeting, the two went to BROWNFIELD's car where he gave MORGAN an envelope containing cocaine. This was the test sample BROWNFIELD was told to provide. The sample was later determined to contain .528 grams of cocaine of 89% purity.

MORGAN and BROWNFIELD spoke on January 13 and January 14, 1982. It was decided that the deal would take place on January 15, 1982.

At Noon on January 15, 1982, MORGAN and WHITEHEAD met BROWNFIELD at the Cannery Row Restaurant in Newport Beach, California. BROWNFIELD told the two that he was having trouble raising $1,000,000 earnest money. BROWNFIELD had $500,000.00 and proposed to purchase 10 kilograms. MORGAN wanted him to take the entire 34 kilograms he had and sell it on a commission basis. After some discussion, MORGAN told him that he could purchase 10 kilograms that day and ten the next day. Each purchase was to be for $500,000.

BROWNFIELD then left the restaurant, but returned later that afternoon. MORGAN and WHITEHEAD followed him in their car to an apartment complex in Santa Ana, California. There, the three got out of their cars and

entered an apartment. In the apartment, BROWNFIELD introduced MORGAN and WHITEHEAD to Petitioner GARY S. BALL. BROWNFIELD stated that the apartment had been rented for the deal.

MORGAN and BALL discussed the quality of the cocaine to be purchased. MORGAN said that the sample he obtained from BROWNFIELD had a melting point of 187 degrees, and the cocaine MORGAN was going to sell had a melting point of 185 degrees. BALL complained that he did not like to buy cocaine "sight unseen." MORGAN stated that he would have furnished a sample if asked. MORGAN told BALL that he was not obligated to purchase the cocaine if he did not approve of its color or purity.

BALL then left the apartment and returned with two briefcases. The briefcases contained money wrapped in silver duct tape. BALL stated that one briefcase contained $200,000 and the other contained $300,000. WHITEHEAD and MORGAN unwrapped some of the bundles and observed $50 bills and $100 bills.

At this time, it was decided that WHITEHEAD and BROWNFIELD would go to the place where the cocaine was kept so that BROWNFIELD could test it. BROWNFIELD stated that if the cocaine "looked good and tested good," he and WHITEHEAD would return with 10 kilos of the cocaine and the first part of the deal would be over. BROWNFIELD and WHITEHEAD left the apartment and then BROWNFIELD was arrested outside of the building.

Meanwhile, MORGAN and BALL stayed in the apartment with the money. While there, BALL allegedly told MORGAN that he would be handling the entire 34 kilograms of cocaine. BALL also indicated that he and MORGAN could do a lot of business at this time. WHITEHEAD returned and BALL was also placed under arrest.

Neither MORGAN nor any other agents had any cocaine in their possession on January 15, 1982. MORGAN testified that he did not intend to sell any cocaine to BROWNFIELD or BALL.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT REQUIRES ONLY A "PRIMA FACIE" SHOWING OF A CONSPIRACY TO ALLOW CO-CONSPIRATOR STATEMENTS TO BE INTRODUCED INTO EVIDENCE AGAINST AN ALLEGED CO-CONSPIRATOR: THIS SHOWING IS SIGNIFICANTLY LESS THAN THAT REQUIRED BY OTHER CIRCUITS. CERTIORARI SHOULD BE GRANTED TO RESOLVE THIS CONFLICT BETWEEN THE VARIOUS CIRCUITS.

The trial court denied Petitioner BALL's motion to strike the out-of-court statements of his co-defendant

(Petitioner BROWNFIELD), and alleged co-conspirator or to limit them to Brownfield. The statements, made outside of Petitioner BALL's presence, and prior to any evidence of Ball's involvement were thus considered as evidence of his guilt.

One of the most complex and confusing areas of federal criminal litigation deals with the conspiracy exception to the hearsay rule. It is generally understood that before a statement of an alleged co-conspirator may be introduced against an accused, the prosecution must establish, by evidence independent of the statement, that a conspiracy existed, that the declarant and the defendant were members of the conspiracy, and that the statement was in furtherance of the alleged conspiracy. All federal courts agree to this formulation of the test. There is a disagreement, however, as to the sufficiency of the evidence to establish each part of this test. Prior to the adoption of the Federal Rules of Evidence this court said that the preliminary showing must be established by "substantial, independent evidence of the conspiracy, at least enough to take the question to the jury." **United States v. Nixon**, 418 U.S. 683, 701, n.14 (1974). However, this test was quickly outdated after the adoption of the Federal Rules of Evidence in 1975. All the Circuit Courts, except the Ninth Circuit, have concluded that Rule 104 of the Federal Rules of Evidence altered the standard of proof necessary to establish these preliminary provisions.

Perhaps the most widely cited case for this change is **United States v. Petrozziello**, 548 F.2d 20, 23 (1st Cir. 1977). There, the First Circuit concluded that Rule 104(a) governed the sufficiency of the showing to establish the preliminary facts of the existence of the conspiracy, the accused's connection to it, and that a statement was in furtherance of it. The court held that the standard encompassed under Rule 104(a) was a higher standard than the **prima facie** standard, that the civil standard applied. A statement was admissible, said the court, only "[i]f it is more likely than not that the declarant and defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy."548 F.2d at 23.

Other Circuits, excluding the Ninth Circuit, that have passed on this question have abandoned the prima facie standard and adopted a more stricter standard: **United States v. Stanchich**, 550 F.2d 1294, 1298 (2d Cir. 1977) (fair preponderance); **United States v. Trowery**, 542 F.2d 623, 627 (3d Cir., **cert. denied** 429 U.S. 1104 (1976)(clear preponderance); **United States v. Stroupe**, 538 F.2d 1063, 1065 (4th Cir. 1976) (substantial independent evidence); **United States v. James**, 590 F.2d 575, 581 (5th Cir.) **cert. denied** 442 U.S. 917 (1979) (substantial independent evidence); **United States v. Enright**, 579 F.2d 980, 984-86 (6th Cir. 1978) (more likely than not); **United States v. Santiago**, 582 F.2d 1128, 1133-35

(7th Cir. 1978)(more likely than not); **United States v. Macklin**, 573 F.2d 1046, 1048 (8th Cir.) **cert. denied** 439 U.S. 852 (1978)(preponderance of evidence); **United States v. Gutierrez**, 576 F.2d 269, 274 (10th Cir.), **cert. denied** 439 U.S. 910 (1978) (substantial independent evidence); **United States v. Haldeman**, 559 F.2d 31, 118 (D.C.Cir.), **cert. denied** 431 U.S. 933 (1976).

The Ninth Circuit, however, has not relinquished the **prima facie** test. In **United States v. Fleishman**, 684 F.2d 1329 (9th Cir.), **cert. denied** 103 S.Ct. 464 (1982), the court said that the test for the admission of statements required "substantial independent evidence of the existence of the conspiracy, and slight evidence of the defendant's connection with the conspiracy." 684 F.2d at 1338. The Ninth Circuit, however, relied upon **United States v. Federico**, 658 F.2d 1337, 1342, n.7 (9th Cir.1981), for this premise. In **Federico**, at note 7, the court said that "Substantial evidence is necessary to show a prima facie case of conspiracy." **Federico**, in turn, relied upon **United States v. Dixon**, 562 F.2d 1138, 1141 (9th Cir.), **cert. denied** 435 U.S. 927 (1976). There, the standard was defined by stating "regarding the **quantum** of evidence required, it is not settled in this Circuit that 'substantial independent evidence, other than hearsay. . .enough to make a **prima facie** case' is sufficient." [Original emphasis] 562 F.2d at 1141.

Likewise, in **Fleishman**, the Ninth Circuit relied upon **United States v. Fried**, 576 F.2d 787, 793, n.7 (9th Cir.),

cert. denied 439 U.S. 895 (1978). In **Fried** at note 7 the court specifically adopted a previously mentioned holding in **Dixon.**

It is clear from the foregoing summary of cases that, while the Ninth Circuit has maintained a **prima facie** standard defining the sufficiency of evidence necessary to establish the existence of the conspiracy, the accused's participation in it, and that the statement offered was in furtherance of the conspiracy, all the other Circuits have interpreted Rule 104(a) as governing the determination of preliminary facts and of requiring that they be established by a preponderance of evidence before the court may allow the co-conspirator's declaration to be admitted. It is respectfully submitted that this case provides this court with the opportunity to resolve this conflict among the Circuits and that certiorari should be granted to determine this important question so that a uniformity of results may be achieved throughout the nation.

II

THE DISTRICT COURT, IN DENYING, WITHOUT HEARING OR INSPECTION, PETITIONER'S REQUEST FOR AN ORDER REQUIRING THE GOVERNMENT TO ALLOW INSPECTION AND COPYING OF ALL STATEMENTS BY AND BETWEEN PETITIONER AND FEDERAL AGENTS DURING THE RELEVANT PERIOD RELYING ON THE GOVERNMENT'S MERE ASSERTION THAT THOSE THEY HAD CHOSEN TO WITHHOLD WERE IRRELEVANT, FAR DEPARTS FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS.

THE COURT OF APPEALS HAS, BY ITS JUDGMENT, SANCTIONED THE SAME AND DECIDED THIS ISSUE IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

Rule 16 (a)(1)(A) of the Federal Rules of Criminal Procedure provides in part:

> "Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government:..."

In the present case, undercover agents had been dealing with the Petitioner BROWNFIELD since September 10, 1981. In addition the meetings and calls during this period

of time where tapes were made and copies given Petitioners, Petitioner BROWNFIELD met with the undercover agents on September 19, September 22, and October 2, 1981. BROWNFIELD spoke with the agents by phone on September 10, September 16, September 22, September 29, November 5, and December 2, 1981. The September 22, 1981 meeting and all of the phone conversations were tape-recorded. The agents made investigatory memos and notes of the September 16, 1981 and October 2, 1981 meetings.

The trial court refused Petitioners request for discovery of the agents' notes and the tape-recordings of these various meetings and phone calls. The government argued that they were irrelevant. (See Appendix which was Stipulation Exhibit 8 at trial.) It is this ruling which the Petitioners presently challenge.

In their opposition papers, the government contended that they were not required to provide the requested conversations citing **United States v. Rinn**, 586 F. 2nd 113 (9th Circuit, 1978). The government's reliance on **Rinn, supra**, is unfounded. In **Rinn, supra**, the defense complained of the introduction of an inculpatory statement at trial that was not made discoverable at pre-trial. The court held that there was no error and relied on the Section of Rule 16 (a)(1)(A), which pertains to statements the government tends to offer at trial. 586 F. 2nd, at 120. In the present case, the Defendant-Petitioner was seeking discovery of statements which were not introduced at trial.

This demand was based on the fact that these statements were relevant to the defense, and were in the control of the government. Thus, the **Rinn, supra**, holding is inapplicable to the case at bar.

The trial court in the instant case not only denied the discovery motion, it also denied a defense motion for an evidentiary hearing to help determine the content and relevancy of the requested statements.

Petitioner contends that the court should have at least inquired as to the contents of the requested statements. This would have posed a minimal burden on the government as they freely admitted they were in possession of the tapes and agents' notes. Because the court did not inquire into the threshhold question of relevance,but instead relied upon the government's assertion, the Petitioners were denied due process of law.

That decision materially impeded Petitioners' ability to present both a legal and factual defense to the charges. Without the requested material, Petitioners were unable to provide additional evidence to establish that their arrest was a product of a government overreaching. Further, Petitioner BROWNFIELD was denied evidence to argue that he did not possess the requisite predisposition to commit the crime and was the victim of entrapment.

It is significant that both the District Court and the Court of Appeals, in denying the Petitioners' argument of outrageous conduct by the government agents relied on a factual finding that it was Petitioner BROWNFIELD who first mentioned narcotics at a meeting on the evening of December 2, 1981.

BROWNFIELD maintains it was the government agents who first discussed a narcotics transaction. No tape of the December 2, 1981 evening meeting exists. The government contended that the taping equipment malfunctioned. The only evidence in support of the government's position is the agents' word.

However, a tape does exist of the phone call by the agents to BROWNFIELD on the morning of December 2, 1981, seeking the meeting with BROWNFIELD and explaining why. The Court sustained the government's refusal to allow Petitioners' inspection and copying of that tape accepting the government's absurd-on-its-face assertion it was not relevant.

This Honorable Court has heretofore created a federal constitutional basis for the requirement that the government turn over relevant material in its possession to the defense. **United States v. Agurs**, 427 U.S. 97.

Petitioner asserts that a constitutional **basis & criteria** must be applied to Rule 16 (a)(1)(A) of F.R. Criminal Procedure such as was developed in **United States v. Agurs**. (See III, 427 U.S. (7, 107, 96 S. Ct. 2392, 2399 F.F.)

Agurs, supra, treated the issue as a due process clause of the Fifth Amendment analysis rather than a scope of discovery authorized by Federal Rules of Criminal Procedure.

It is in the former vein that the error of the District Court and the United States Ninth Circuit must be approached and analyzed.

This Honorable Court in **United States v. Agurs, supra**, addressed the **constitutional** significance, if any, of the prosecution failing to turn over materials in its possession, pre-trial or surfacing during the trial, to the defense absent a **specific request** naming the desired material within the meaning of **Brady v. Maryland** 373 U.S. 83, 87 101 Ed. 2nd 215, 83 S. Ct. 1194.

This court categorized the "Brady rule" as "arguably applying" to a "general request" for discovery of material helpful or exculpatory to the defendant. (427 U.S. 97 107).

In the Leading decision of this Honorable Court in **Jencks v. United States**, 353 U.S. 657, 669, 77 S. Ct. 1007, 1014, this Court disproved the requirement that materials in the possession of the government first be placed before the trial judge for the courts determination of relevancy and materiality. **Only after** inspection of the reports by the defendant and his counsel must the trial judge determine admissability, i.e.; the evidentiary questions of inconsistency, materiality and relevancy. (See also **Goldman v. United States** 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322.

The government had a duty to not select and choose which tapes and notes to turn over containing the conversations of Petitioner and the agents during the relevant period, but to turn all of them over.

"The purpose of the duty is not simply to correct an imbalance of advantage, whereby the prosecution may surprise the defense at trial with new evidence; rather, it is also to make of the trial a search for truth informed by all relevant material, much of which, because of imbalance in investigative resources, will be exclusively in the hands of the Government." (**United States v. Bryant,** 439 F. 2nd 642, (1971), at 648).

III

THE COURT OF APPEALS HAS INTERPRETED A FEDERAL STATUTE IN CONFLICT WITH DECISIONS OF THIS COURT, AND HAS SANCTIONED THE DISTRICT COURT'S DEPARTURE FROM THE ACCEPTED AND USUAL PROCEDURE OF JUDICIAL PROCEEDINGS BY RESOLVING DOUBTS IN EVIDENCE AND CONSTRUCTION OF PENAL STATUTE AGAINST THE PETITIONERS.

With minimal discussion, the Court of Appeals found the evidence against Petitioner sufficient to support the conviction of conspiracy to "purchase" cocaine.

Overlooked by the Appeals Court is the law in its entirety. There is no criminal sanction or prohibition for either **purchase** or **conspiracy to purchase** a controlled substance. The crime does not take place until two (2) people decide to possess the controlled substance, and distribute and/or sell it.

It is well established that penal statutes are to be strictly construed (**Federal Communications Commission v. American Broadcasting Company**, 347 U.S. 284, 296), and that one is not to be subjected to a penalty unless the words of the statute plainly impose it (**Kemple v. Tiffin Savings Bank**, 197 U.S. 356, 362).

It is apparent that Congress wanted to avoid the legal difficulties of attempting to show that two parties agreed to make a purchase, and purposely omitted that word and act, even though many state statutes contain such prohibitation. Congress did not want prosecutions of the crime to be mired in the laws of contracts and the validity of the buy-sell agreement.

In the present case, the Petitioners never agreed to possess cocaine without first examining the quality and cosmetic appearance of the substance. The record clearly indicates that the Petitioners were to satisfy two (2) conditions before the agreement to possess was to be reached. First, Petitioner BROWNFIELD was to demonstrate his ability to make a purchase by exhibiting five hundred thousand dollars ($500,000.00). This was done. Second, the agents were to demonstrate their ability to perform by showing Petitioner BROWNFIELD cocaine of high quality and appearance. It was only after this condition was met that the two (2) Petitioners would agree whether to possess or not. In fact, Agent MORGAN told the Petitioners that they were not obligated to purchase any cocaine unless the pair agreed that the contraband met their approval with respect to quality and appearance.

This condition was never met, and as such, the two (2) Petitioners never had the opportunity to agree to possess the cocaine.

BALL was BROWNFIELD's partner in some legitimate businesses giving innocent reason for telephone calls. The Court resolved all reasonable inferences of the evidence and in the construction of the law against Petitioners.

IV

THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO CLARIFY ITS DECISION IN **HAMPTON V. UNITED STATES**, 425 U.S. 484, (1976), CONCERNING GOVERNMENTAL OVERREACHING, (**OUTRAGEOUS GOVERNMENTAL CONDUCT**), AND TO RESOLVE AN APPARENT CONFLICT IN DECISIONS BETWEEN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND OTHER CIRCUITS.

Petitioner maintains that the federal agents' conduct and involvement in the crime for which he was convicted was so overreaching as to compel reversal as a matter of due process of law. The Ninth Circuit adopted this argument in **Greene v. United States**, 454 F.2nd 783 (9th Circuit, 1971). In **Greene, supra**, the court reversed convictions on the ground that government agents resorted to impermissible misconduct in manufacturing the

crime, even though it was found that the defendants had the predisposition to commit the offense.

This Honorable Court has also recognized such an argument. In **United States v. Russell**, 411 U.S. 423 (1973) this court suggested in dictum:

> We may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction. . .
>
> 411 U.S. at 431-432.

This Honorable Court next addressed the issue in **Hampton v. United States**, 425 U.S. 484 (1976). Eight (8) justices took part in the plurality opinion. Two (2) of the justices declined to address the argument, three (3) justices of the plurality took the position that such a right did not exist while five (5) justices decided that the right did exist.

Petitioner contends that in the present case, the government's conduct went far beyond investigation and in such a way as to deprive him of his due process of law.

In **United States v. Twigg**, 558 F.2nd 373 (3rd Circuit, 1978), the court found that because the crime was conceived and contrived by government agents, reversal was warranted; 558 F.2nd at 380. In the opinion, the court examined the **Russell** and **Hampton** opinions, as well as several District Court opinions.

These cases, the court found, examined two principles of law: (1)Whether under any circumstances the government should be able to provide, or pretend to provide, contraband or instrumentality of crime to investigate narcotics offenses; and (2) If they are so allowed, under what circumstances. The **Twigg**, court found that cases are now settled that it is permissible for the government to provide, instrumentalities to infiltrate and investigate **existing criminal activity**. However, the **Twigg** court did not read those cases to stand for the proposition that such a distasteful and disturbing tactic could be used to create a criminal activity to apprehend someone they felt to have been a criminal. In short, the cases consistently held to the old adage: "It is not the jewel thief that is investigated, it is the theft of the jewels."

In determining that the **Twigg** facts warranted reversal, the court stated that:

> The conduct on the part of the government agents generated new crimes by the defendant merely for the sake of pressing criminal charges against him, when, as far as the record reveals, he was lawfully and peacefully minding his own affairs.
>
> 558 F. 2nd at 380.

The present case is one in which the government approached Petitioner BROWNFIELD and generated a new crime. When the agents approached BROWNFIELD in September of 1981, they wanted to work out a money laundering deal. The government had no reason to believe that BROWNFIELD was engaged in criminal activity, and there is no evidence that in fact they did so believe.

As in **Twigg**, it was the agents who created the crime herein. But, unlike **Twigg**, it took three (3) attempts before a crime was finally brought about. First, the government sought to create a money laundering scheme. When Petitioner came up with a legal method of laundering the money, the government ventured into narcotics. But when Petitioner thought the agents were interested in dealing marijuana, the agents instead told Petitioner that they wanted a cocaine transaction, in which they, the government, would provide cocaine, they would smuggle in, and Petitioner would be their distributor.

On the January 7, 1982 meeting, it is clear that Petitioner had no existing operation. He was borrowing money for some of the contraband, and the rest would be "fronted" to him by MORGAN, while Petitioner would establish an organization for MORGAN. It was thus tacitly clear to the government by January 7, 1982, despite BROWNFIELD's false claims and puffing on December 16, 1982, that no organization in fact existed of which Petitioner was a part, and he was not then involved in criminal conduct.

The Third Circuit was guided by and quoted extensively from this Court's opinions in **United States v. Russell, supra,** and **United States v** Citing **Russell, supra,** the Third Circuit said:

> "The Court went on to make an important point not present here -- that the defendant was an active participant in an illegal drug manufacturing enterprise which began before the government agent appeared on the scene...Id. at 436, 93 S.Ct. at 1645." (**U.S. v. Twigg, supra,** at 377)

The Court of Appeals in its decision relied in its finding of fact that after some three (3) months of contact and discussions BROWNFIELD suggested the activity be the distribution, too, rather than strictly the finance side.

The government limited the scope of their charges against Petitioners to the latter issue and time period. The thrust of the Ninth Circuit's decision in this case would limit the consideration of the conduct of agents to only the indicted offenses, rather than adopt the Third Circuit's rule in **Twigg, supra,** which would consider the entire involvement of the agents with the person charged and their involvement in suggesting criminal activity when none existed.

CONCLUSION

The Court should grant Certiorari in this case to resolve the issues where the Court of Appeals for the Ninth Circuit has entered a decision of law in conflict with other Circuits that need to be resolved, to wit: (1) The evidence necessary to establish a person's involvement in a conspiracy, in order to introduce an alleged co-conspirator's statement against him, and (2) the factors and course of conduct to be considered in assessing the actions of federal investigators as to whether they constitute outrageous conduct mandating dismissal of charges under the due process clause.

The Court should grant Certiorari in this case in order to clarify and settle the rule of law under **U.S. v. Hampton**, supra, especially in light of the growing federal operations known as "reverse stings", so that both the public and the agents themselves know the limits to the involvement and approaches agents can make before they are creating crime instead of investigating it.

The Court should grant Certiorari in this case because the Court of Appeals itself has departed from the usual procedures of judicial process, and has sanctioned such activity by the District Court, by interpreting evidence and the construction of a statute against the Petitioners

where there are reasonable interpretations construable in favor of them. Such decisions are also in conflict with decisions by this Court.

In the same light this Court should grant Certiorari regarding the access to evidence in the government's possession containing statements made by Petitioner to federal agents during the course of events relevant to the proceedings in which they are charged, which the defendants claim would aid their defense. At least, the Court should require a hearing before denial rather than allow the rule of law to stand in the Ninth Circuit that the government has a right to pick and choose what it wants to provide a defendant without judicial oversight.

Respectfully submitted,

Michael D. Nasatir
Member of the Bar, U.S. Supreme Court
Alan M. May
Kevin E. Robinson
Roger S. Hanson
Member of the Bar, U.S. Supreme Court
Attorneys for Petitioner

STATEMENT OF RELATED CASES

Pursuant to Rules of the United States Supreme Court, Appellant knows of no cases that are related to this appeal which are now pending before this court.

DATED: December 12, 1983.

Alan M. May
Attorney for Appellants

APPENDIX

ORDER DENYING PETITION FOR REHEARING WITH SUGGESTION FOR HEARING EN BANC
UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

No. 82-1655

Appellee,

DC No. CR 82-95-RJK

v.

GARY S. BALL,

Appellant.

UNITED STATES OF AMERICA,

No. 82-1658

Appellee,

DC No. 82-95-RJK

v.

ORDER

JOHN HANNA BROWNFIELD,

Appellant.

FILED
OCT 18 1983
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

Appeal from the United States District Court
for the Central District of California
Robert J. Kelleher, District Judge, Presiding

Before: CHAMBERS, SKOPIL, and FARRIS,
Circuit Judges.

The panel has voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petitions for rehearing are denied, and the suggestions for rehearing en banc are rejected.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

Jul 18 1983

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

GARY S. BALL,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JOHN HANNA BROWNFIELD,

Defendant-Appellant.

No. 82-1655

DC No. CR 82-95-RJK

No. 82-1658

DC No. 82-95-RJK

MEMORANDUM

Appeal from the United States District Court
for the Central District of California
Robert J. Kelleher, District Judge, Presiding

Argued and submitted June 8, 1983

Before: CHAMBERS, SKOPIL, and FARRIS, Circuit Judges

Brownfield challenges his conviction for conspiracy to possess and distribute cocaine, in violation of 21 U.S.C. § 846, and his conviction for distribution of cocaine, in violation of 21 U.S.C. § 841. Ball challenges his conviction for conspiracy to possess and distribute.

ISSUES

Brownfield makes the following claims:

(1) The trial court erred by refusing appellant's request for discovery of statements made to government agents.

(2) There was insufficient evidence to support his conviction for conspiracy.

(3) He was deprived of due process because of outrageous government conduct.

(4) He was entrapped.

Ball argues:

(1) There was insufficient evidence to support his conviction.

(2) The government was guilty of outrageous conduct.

(3) The trial court erred in denying his motion to suppress.

(4) The trial court erred by intervening in the examination of a prosecution witness.

(5) The trial court erred by denying his motion for severance.

DISCUSSION

A. Brownfield.

(1) Refusal of discovery.

The conspiracy with which this case is concerned took place between December 16, 1981 and January 15, 1982. For several months prior, however, government agents operating undercover had been meeting with Brownfield. During these meetings numerous conversations involving Brownfield were taperecorded. Discussion of drug dealing first occurred on December 2, 1981. Brownfield argues the district court erred when it refused his motion to compel discovery of pre-December 2 recordings.

Under Fed.R.Crim.P. 16(a)(1)(A), a defendant is entitled to production of "any relevant written or recorded statements made by the defendant . . . within the possession . . . of the government. . . ." The government should disclose any statement made by the defendant that "**may** be relevant to **any possible** defense or contention that the

defendant might assert." **United States v. Bailleaux**, 685 F.2d 1105, 1114 (1982)(emphasis added). Brownfield argues that the statements are relevant to his defenses of entrapment and outrageous government conduct in that they reveal the course of relations between the government and defendants during the period leading up to the criminal activity for which he was convicted.

We need not decide whether the district court abused its discretion in refusing Brownfield's discovery motion. Even if it did, Brownfield was not prejudiced. The record clearly indicates that Brownfield initiated discussion of narcotics on December 2, 1981. He said that "his people" had a problem, that their "sources" in Miami were catching heat and had dried up, and that they were short of "product." Brownfield argues that he was "lured" into criminal activity "created" by the government. The record belies such assertions. The December 2, 1981 conversations clearly indicated that it was Brownfield who turned the relationship towards narcotics dealing. The government did no more than make available an opportunity for appellants to exercise their predisposition for criminal drug activity. The content and context of the December 2, 1981 conversations negate the assertions by Brownfield of harm flowing from lack of access to statements made by him in his early dealings with government agents.

(2) Sufficiency of the evidence.

A conviction will be upheld against a claim of insufficiency if any rational trier of fact, viewing the evidence in the light most favorable to the government, could find the essential elements of the offense beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319 (1979).

The evidence against Brownfield of a conspiracy to purchase cocaine is overwhelming. It includes many discussions with federal agents concerning his partner, the records of phone calls between Brownfield and Ball, and his production of Ball with over a half-million dollars. There is ample evidence that Brownfield and Ball had agreed to purchase commercial quantities of cocaine, and Brownfield's assertions to the contrary border on the frivolous.

(3) Entrapment.

Entrapment is available as a defense "when the Government's deception actually implants the criminal design in the mind of the defendant...." **United States v. Russell**, 411 U.S. 423, 436 (1973). If a defendant is predisposed to engage in criminal activity the defense of entrapment is not available. **Hampton v. United States**, 425 U.S. 484, 490 (1976).

This court has identified a number of factors to be considered in determining whether the defendant was a person otherwise innocent in whom the government implanted the criminal design.

> "While none of the factors alone indicates either the presence or absence of predisposition, the most important factor, as revealed by Supreme Court and other decisions, is whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated Government inducement."

United States v. Reynoso-Ulloa, 548 F.2d 1329, 1336 (9th Cir. 1977), **cert. denied**, 436 U.S. 926 (1978).

Brownfield evidenced no reluctance to enter into a narcotics transaction and there was no need for the government to repeatedly induce him to enter into criminal drug activity. Brownfield originated discussions of drug dealing. He was clearly predisposed to drug trafficking. There was no entrapment.

(4) Outrageous government conduct.

This court has recognized the availability of a defense of outrageous government conduct when the government activity complained of reaches extremes that are outrageous or grossly shocking. **United States v. Tavelman**, 650 F.2d 1133, 1140 (9th Cir. 1981), **cert. denied**, 455 U.S. 939 (1982). Nothing that the government has done in this case is so extreme or objectionable as to implicate due process concerns. The government's participation in the events here, if objectionable at all, are less so than in **Tavelman, supra**, where we found no outrageous conduct.

B. Ball

(l) Sufficiency of the evidence.

Ball's appearance with over $500,000 in cash at the apartment where Brownfield had promised his partner and he would conduct their purchase of cocaine identified Ball, even ignoring the other evidence, as one with whom Brownfield had agreed to conduct illegal activity. There was no lack of evidence to support Ball's conspiracy conviction.

(2) Outrageous government conduct.

Ball's argument fails for the same reason as Brownfield's. The record simply discloses no government behavior which can be termed "outrageous." Any errors in information presented to the grand jury were minor in nature. Moreover, Ball has not claimed that the government deliberately misled the grand jury or otherwise proceeded in bad faith.

(3) Motion to suppress.

Subsequent to Ball's arrest a warrant was procured and his home was searched for further evidence of drug trafficking. We have previously approved warrants which were based on the inference that suspected drug dealers would have evidence of their illegal activities at their homes. **See United States v. Valenzuela**, 596 F.2d 824, 828-29 (9th Cir.), **cert. denied, sub nom.** 441 U.S. 965 (1979); **United States v. Spearman**, 532 F.2d 132, 133 (9th Cir. 1976). The affidavit accompanying the appli-

cation for the warrant contains factual assertions permitting the inference that his home would likely contain damaging evidence. The search warrant was not defective.

(4) Intervention in witness examination.

Ball's assertion that the trial judge impermissibly intervened in the examination of a witness is meritless. Not only is questioning by a trial judge proper, **Spindler v. United States**, 336 F.2d 678 (9th Cir. 1964), **cert. denied**, 380 U.S. 909 (1965), but Ball has failed to allege any harm flowing from the trial judge's questioning.

(5) Motion for severance.

Severance motions are addressed to the sound discretion of the trial court and separate trials need not be ordered "unless a joint trial is manifestly prejudicial." **United States v. Donaway**, 447 F.2d 940, 943 (9th Cir. 1971). A review of the record, plus the fact that this was a trial to the court, convinces us there was no error in the denial of severance.

CONCLUSION

The district court is AFFIRMED.

FILED
AUG 31 1982
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

No. CR 82-95-RJK

v.

JOHN HANNA BROWNFIELD,
GARY S. BALL,

Defendants.

MEMORANDUM OF DECISION
AND ORDER

This case having come before the Court upon the defendants' motion to dismiss, being renewed on the day of trial, and also for trial before the Court sitting without a jury, each defendant being present personally and by his attorney of record, the case proceeded to trial and was thereafter submitted for decision by the Court.

Most of the facts in the case were presented to the Court pursuant to stipulation in written form. By the terms of the stipulation, it was agreed that certain witnesses were deemed to have been sworn and testified in accordance with the written submissions, subject to cross-examination by the adverse parties, all of which was done.

The Court finds that the evidence of the commission of the crime of conspiracy was overwhelming as to the defendant Brownfield and was more than ample as to the defendant Ball. The defendants' contention was that the evidence admitted as to one co-conspirator's statements against the other should have been excluded on the ground that there was a lack of independent evidence of the existence of the conspiracy. As to defendant Ball, ground, and, when produced by Ball, showed evidence of the existence of the conspiracy by reason of various admissions on the part of Ball as to his criminal association with Brownfield and his familiarity with the details of the conspiratorial purpose, as previously disclosed by Brownfield in his conversations with the undercover agent. In addition, the evidence is clear that the money produced by Ball was the very same money to which Brownfield had previously referred in his statements to the agent that it was money that was buried beneath the ground, and when produced by Ball, showed evidence of mud and other indications that it came from some dug-up place.

The Court finds that it was wholly clear that each defendant was fully aware of, and voluntarily participated in, the illicit plan to possess cocaine with intent to distribute it. The meetings and conversations between the agents and the defendants, and the aborted purchase plan of ten kilograms of cocaine, demonstrate first that there was on the part of the defendants a conspiracy to engage in the illegal trafficking in cocaine, and the amount of ten kilograms amply establishes that it was a transaction in which there was an intent to distribute the cocaine.

The Court finds that defendant Brownfield's contention that he was entrapped to be wholly unmeritorious. It is abundantly clear that he had at the outset, and continued to have, a predisposition to commit the violations of law which were involved here, including the possession and distribution of cocaine. As an adjunct to their entrapment defense, the defendants assert that there ought to be a finding by the Court that the conduct of the government was so outrageous as to preclude conviction. The Court finds, not only that the conduct was not "so outrageous," but indeed was not outrageous at all or in any respect. It constituted nothing more than the affording to the defendants of an opportunity to consummate their illegal plan.

Accordingly, the Court finds defendant Brownfield guilty as to Counts One and Two. The Court finds defendant Ball guilty as to Count One.

The Court finds that Count Three and its charges therein against defendant Ball for possession of cocaine are insufficiently supported by the evidence, and hence it is ORDERED that there be entered as to Ball, and as to Count Three, a judgment of acquittal.

Accordingly, it is ORDERED thatjudgment be entered as to each defendant in accordance with the findings herein set forth and in accordance with this Order of the Court.

The Clerk shall send, by United States mail, a copy of this Memorandum of Decision and Order to counsel for the parties.

DATED: August 3, 1982.

ROBERT J. KELLEHER
United States District Judge

U. S. Department of Justice
SST:RLB:RJP:ban
(213) 688-2699

United States Attorney
Central District of California

United States Courthouse
312 North Spring Street
Los Angeles, California 90012

April 8, 1982

Michael D. Nasatir, Esq.
9911 West Pico Boulevard
Suite 1000
Los Angeles, California 90035

Michael McDonnell, Esq.
440 East La Habra Boulevard
La Habra, California 90631

Re: **United States v. John Hanna Brownfield, et al.**

Dear Counsel:

Please find enclosed additional discovery in the above case. At this time it is the government's intention to **not** call Internal Revenue Service Special Agent Fran Dyer as

a witness in the above case. Attached is a discovery summary of tape recordings and reports prepared concerning the various contacts defendants Brownfield and Ball had with undercover agents in this case. It is the government's position that Brownfield's statements in meetings with Special Agent Dyer about money laundering are not discoverable. See **United States v. Rinn** which is cited in our opposition to your discovery motions.

The items designated by (**) are hereby enclosed.

Very truly yours,

STEPHEN S. TROTT
United States Attorney

ROBERT J. PERRY
Assistant United States Attorney
Controlled Substance Unit

Enclosure

DISCOVERY SUMMARY

Legend:

*: distributed 2/18/82
**: distributed 4/9/82
***: not discoverable

I. UNDERCOVER MEETINGS AND EXECUTION OF SEARCH WARRANT

1. 9/19/81 — Meeting at LAX; Special Agent Dyer and Brownfield. Not recorded.

   Reports: Memo by Dyer dated 9/20/81 (***)
   Notes by Dyer mis-dated 7/19/81 (***)

2. 9/22/81 — Meeting in Seattle; Special Agent Dyer, Special Agent Whitehead, and Brownfield.

   Tapes: IRS tapes 3A and 3B - recording of car conversations (*)
   IRS tape 4 - recording on boat (*)
   IRS tape 5 - recording on boat (same conversation as IRS tape 4, but recorded off transmitter) (*)

3. 10/2/81 — Meeting at LAX; Special Agent Dyer and Brownfield. Not recorded.

   Reports: Memo (handwritten) by Dyer dated 10/5/81 (***)
   Notes by Dyer dated 10/2/81 (***)

4. 12/2/81 — Meeting at Century Plaza Motel bar; Special Agent Dyer, Special Agent Whitehead, Special Agent Aaronson, Brownfield, Joleen.
   Not recorded due to equipment malfunction.

   Reports: Memo (handwritten) by Dyer dated 12/2/81 (**)

	Memo (handwritten) by Whitehead dated 12/2/81 (**)
	Memo by Special Agent Reimer regarding recorder malfunction (**)
5. 12/16/81	Meeting at Sheraton La Reina Hotel; Special Agent Whitehead and Brownfield; travel to Casa Escobar Restaurant, Marina Del Rey to meeting with Special Agent Morgan and Special Agent Aaronson. Tape recorded.
Tapes:	IRS tapes 10A and 10B (*)
	DEA tapes 1A and 1B (*)
Reports:	DEA 6 by Morgan dated 1/5/82 (*)
6. 1/6/82	Meeting at Cannery Restaurant, Newport Beach; Special Agent Morgan and Brownfield. Tape recorded.
Tapes:	DEA tapes 2A and 2B (*)
Reports:	DEA 6 by Morgan dated 1/11/82 (*)
	DEA 6 by Nance dated 1/7/82 (*)
7. 1/7/82	Meeting at Charley Brown's Restaurant, Rosemead; Special Agent Morgan and Brownfield. Tape recorded.
Tapes:	DEA tapes 3A and 3B (*)
Reports:	DEA 6 by Morgan dated 1/14/82 (*)
	DEA 6 by O'Connor dated 1/27/82 (*)
	DEA 7 by Buer dated 1/12/82 (*)

8. 1/15/82 Meeting at apartment in Santa Ana; Special Agent Whitehead, Special Agent Morgan, Brownfield, and Ball. Not tape recorded.

Reports: Memo by Whitehead dated 1/15/82 (**) DEA 6 by Morgan dated 1/22/82 (*) DEA 6 by O'Connor dated 1/27/82(*)

9. 1/19/82 Execution of search warrant at Knollwood.

Reports: DEA 6 by Nance dated 2/4/82 (*)
DEA 7 by Buer dated 1/25/82 (*)

II. UNDERCOVER TELEPHONE CONVERSATIONS

1. IRS Tape 6 by Special Agent Dyer. Includes unsuccessful attempts to reach Brownfield by telephone on 9/9/81, 9/10/81, 9/16/81; conversations with Brownfield on 9/10/81, 9/16/81, and 9/22/81 (***)
2. IRS Tape 7 by Special Agent Dyer. Includes unsuccessful attempts to reach Brownfield by telephone on 10/1/81, 10/28/81, 11/4/81, 11/25/81, 11/30/81, 12/1/81; conversations with Brownfield on 9/29/81, 11/5/81.(***)
3. IRS Tape 8 by Special Agent Dyer and Whitehead. Calls of 12/7/81, 12/8/81, 12/11/81. (**)
4. IRS Tape 9 by Special Agent Whitehead. Call to Brownfield on 12/16/81. (**)
5. IRS Tape 11 by Special Agents Whitehead and Dyer. Calls of 12/21/81, 12/28/81, 12/31/81, 1/5/82. (**)
6. IRS Tape 12 by Agent Whitehead. Calls to Brownfield on 1/8/82 (**)
7. DEA Tape 4A by Agent Morgan. Conversations with Brownfield on 1/5/82 and 1/7/82. (*)
8. DEA Tape 4B by Agent Morgan. Conversations with Brownfield on 1/11/82. (*)
9. DEA Tape 4C by Agent Morgan. Conversations with Brownfield on 10/10/82 and 1/14/82. (*)

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 4075 Agate Street, Riverside, California 92509. On December 12, 1983, I served the within PETITION FOR A WRIT OF CERTIORARI on the interested parties in said action, by placing a true copy in each of two (2) sealed envelopes, with postage thereon fully prepaid, in the United States mail at San Bernardino, California, addressed as follows:

REX LEE
Solicitor General of the United States
Department of Justice
Room 5143
Washington, D.C. 20530

Alexander H. Williams, III
Acting U.S. Attorney
312 N. Spring Street
Los Angeles, California 90012

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on December 12, 1983, at Riverside, California.

JACK GALLAGHER